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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 41

GENERAL UTILITIES AND OPERATING COMPANY, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION FOR CERTIORARI FILED MAY 3, 1935.

CERTIORARI GRANTED JUNE 3, 1935.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 52770

GENERAL UTILITIES AND OPERATING Co., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Taxpayer: R. Kemp Slaughter, Esq., Hugh C. Bickford, Esq., Jos. Slattery, Esq.
For Comm'r: Paul Waring, Esq., Wm. E. Davis, Esq.

DOCKET ENTRIES

Transferred to Mr. Arundell 1/6/34

1931.
Feb. 12. Petition received and filed. Taxpayer notified. (Fee paid.)
" 12. Copy of petition served on General Counsel.
Mar. 10. Answer filed by General Counsel.
" 13. Copy of answer served on taxpayer. General Calendar.

1932.
Aug. 9. Hearing set Oct. 5, 1932.
Sep. 20. Motion to consolidate with dockets 50510-11-12 and 50249, and for hearing 10/5/32, filed by General Counsel.
" 23. Hearing set Sept. 28, 1932, on motion.
Sep. 28. Hearing had before Mr. Arundel on motion to consolidate—withdrawn. To remain on Day Calendar of Oct. 5, 1932.

[fol. 2] 1932.
Sep. 28. Order granting respondent leave to withdraw motion to consolidate this proceeding to remain on Day Calendar of Oct. 5, 1932, to be heard on merits, entered.

1932.

Oct. 5. Hearing had before Mr. Arundell on merits. Submitted. Stipulation of facts filed. Briefs due in 15 days. Respondent's reply in 15 days.

" 12. Transcript of hearing of 10/5/32 filed.

" 18. Brief filed by taxpayer. 10/21/32, copy served on General Counsel.

" 31. Brief filed by General Counsel.

Nov. 10. Motion for extension to 11/19/32 to file reply brief filed by taxpayer. Granted.

" 17. Reply brief filed by taxpayer. 11/21/32, copy served on General Counsel.

1933.

Apr. 24. Findings of fact and opinion rendered, C. R. Arundell, Div. 7. Decision will be entered for the petitioner.

" 27. Decision entered C. R. Arundell, Div. 7.

May 17. Motion that Board reconsider decision filed by General Counsel.

" 26. Order denying motion that Board reconsider decision and that report and determination be recalled and the proceeding referred to Div. 4 for consideration and report and decision based on report of April 27, 1933, be vacated entered.

1934.

Jan. 30. Findings of fact and opinion rendered, C. Rogers Arundell, Div. 7. Decision will be entered for the petitioner.

Feb. 2. Decision entered, C. R. Arundell, Div. 7.

Apr. 23. Petition for review by U. S. Circuit Court of Appeals (4), with assignments of error, filed by General Counsel.

" 27. Proof of service filed by General Counsel. (2)

Jun. 15. Præcipe filed—proof of service thereon.

" 19. Order enlarging time to July 31, 1934, for transmission and delivery of record entered.

[fol. 3] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed Feb. 12, 1931

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commis-

sioner of Internal Revenue in his notice of deficiency (IT:AR:C 8-DBH-60D) dated December 16, 1930, and as a basis of his proceeding alleges as follows:

1. The petitioner is a corporation organized under the laws of the State of Maryland with its principal office at 1310 Standard Oil Building, Baltimore, Maryland.

2. The notice of deficiency, a copy of which is attached and marked "Exhibit A" was mailed to the petitioner on December 16, 1930.

3. The taxes in controversy are income taxes for the calendar year 1928 in the amount of to-wit $128,342.07.

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

The Commissioner of Internal Revenue has erroneously held that the petitioner corporation made a profit of $1,069,517.25 by distributing to its own stockholders certain capital stock of another corporation which it had theretofore owned.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Some time prior to 1928 the petitioner, General Utilities and Operating Company, acquired as bonus stock [fol. 4] and at no cost to it, twenty thousand (20,000) shares of the common capital stock of another corporation, the Islands Edison Company. This stock was placed upon its books at a nominal value of Two Thousand Dollars ($2,000.00). On March 22, 1928, the petitioner, by proper resolution of its Board of Directors, directed that Nineteen Thousand and Ten (19,010) shares of such capital stock should be distributed to its own stockholders in the ratio of two shares of such stock to each share of the common stock of the petitioner corporation.

(b) The shares of common stock were appreciated on the books of the General Utilities and Operating Company to a total value of $1,120,500 and by simultaneous entry were thereupon distributed to the stockholders in accordance with the aforementioned resolution of the Board of Directors on March 22, 1928. The certificate or certificates of said common stock of the Islands Edison Company were

actually transferred to the individual stockholders and were by them transferred on the books of the Islands Edison Company and new shares issued to the individuals who thereafter were the proper owners of said common capital stock.

(c) The Commissioner of Internal Revenue in preparing the aforementioned notice of deficiency held that the petitioner corporation derived a profit of $1,069,517.25 from such appreciation and distribution and added such amount to the taxable net income of petitioner, which action resulted in the deficiency hereby appealed from.

Wherefore petitioner respectfully prays that this Board may hear the proceedings and determine

1. That the petitioner corporation made no profit from the appreciation of the aforesaid common capital stock of the Islands Edison Company and the distribution of the stock to its own stockholders.

2. That there is no deficiency due by petitioner.

R. Kemp Slaughter, Hugh C. Bickford, Counsel for Petitioner.

[fol. 5] *Duly sworn to by H. P Lucas. Jurat omitted in printing.*

EXHIBIT "A" TO PETITION

IT:AR:C-8 DBH-60D

Mailed Dec. 16, 1930

General Utilities and Operating Company, 1310 Standard Oil Building, Baltimore, Maryland.

SIRS:

You are advised that the determination of your tax liability for the year 1928 discloses a deficiency of $128,342.07 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth

day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and for- [fol. 6] ward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully, David Burnet, Commissioner, by (Signed) W. T. Sherwood, Acting Deputy Commissioner.

Enclosures: Statement, Form 882, Form 870, Schedules 1 to 3, inclusive.

HT-3.

Statement

IT:AR:C-8 DBH-60D

Returns Examined

Company	Year	Form
General Utilities and Operating Company, 1310 Standard Oil Building, Baltimore, Maryland	1928	1120

Tax Liability

General Utilities and Operating Company

Year	Corrected tax liability	Tax previously assessed	Deficiency
1928	$132,023.89	$3,681.82	$128,342.07

[fol. 7] The revenue agent's report covering the year 1928 has been considered in this examination and has been accepted as submitted.

Careful consideration has been given to the contentions raised in your protest to the revenue agent in charge at Baltimore, Maryland, dated May 7, 1930; your protest dated October 27, 1930, and at a conference in Washington, D. C., on November 18, 1930. However, this office finds no basis for a revision of its findings as set forth in Bureau letter of October 7, 1930. See Schedule 2(a).

A carbon of this letter has been mailed to Messrs. Slaughter and Bickford, 815 Fifteenth Street, N. W., Washington, D. C., in accordance with the authority contained in a power of attorney running to them, which is on file in this office.

General Utilities and Operating Company

Year Ended December 31, 1928

Schedule 1

Net Income

Net income as disclosed by return	$30,681.83
As corrected	1,100,199.08
Adjustment	$1,069,517.25

Unallowable deductions and additional income:

(a) Profit realized on stock distributed as a dividend	$1,069,517.25	
Net adjustment as above		$1,069,517.25

Schedule 2

Explanation of Items Changed

(a) On March 22, 1928, the Board of Directors of your company passed a resolution providing:

[fol. 8] "(a) That this company appreciate on its books its holdings of common stock of The Islands Edison Company in the amount of 20,000 shares, in the amount of $1,120,500.00, and that the amount of this appreciation be credited to surplus arising from appreciation of assets."

"(b) That a dividend of $1,071,426.25, be, and it is hereby declared on the common stock of this company, payable in

common stock of The Islands Edison Company, at a valuation of $56.125, a share out of the surplus arising from appreciation, xxx."

This office after careful consideration of the above resolution is of the opinion that it created an obligation on the part of the corporation to pay to its stockholders $1,071,426.25, or its equivalent, and that the liquidation of this obligation by the payment of stock costing $0.10 a share, and having a market value of $56.125, resulted in the realization of profit to the corporation of the difference between the cost and market value, or $56.025 a share for the reason that the satisfaction of the obligation by the distribution of the stock was in effect a sale of the stock and a distribution of the proceeds. Your attention is invited to the decision by the United States Board of Tax Appeals in the case of the Bacon-McMillan Veneer Company v. Commissioner of Internal Revenue, 20 B. T. A., which held substantially as stated above in your case, and added,

"If the resolution had merely provided that the Liberty Bonds should be distributed by way of dividends, a different situation would have been presented which is clearly distinguishable from the case we have before us. In our opinion the petitioner realized taxable gain when the Liberty Bonds were distributed in satisfaction of the dividend obligation." So that had your resolution merely provided for the distribution of the stock as a dividend there would clearly have been no gain to the corporation.

A distinct similarity in terminology is noted in the resolution of your company and the Bacon-McMillan Veneer Company.

The resolution of the latter company was that a "fifty [fol. 9] per cent dividend be declared, and made payable in Liberty Loan Bonds, at their market value." Your resolution provided that a "dividend in the amount of $1,071,426.25 be and it is hereby declared payable in common stock of The Islands Edison Company at a valuation of $56.125 a share."

Both dividends declared were sums certain (the amount in the case of the Bacon-McMillan Veneer Company being rendered certain by computation), and both provided for the payment of the dividends in securities owned by the corporation at their market value at distribution.

It is therefore held that your corporation realized a taxable gain of $1,069,517.25 upon the distribution of The Islands Edison Company stock in payment of the dividend of $1,071,426.25, as follows:

Distribution of 19,090 shares of stock at market value of $56.125 a share in satisfaction of dividend obligation	$1,071,426.25
Cost of stock distributed, $0.10 a share	1,909.00
Profit realized	$1,069,517.25

HT-3.

General Utilities and Operating Company

Year Ended December 31, 1928

Schedule 3

Computation of Tax

Income Tax

Net income for taxable year	$1,100,199.08
Income tax 12%	$132,023.89
Total previously assessed	3,681.82
Additional tax to be assessed	$128,342.07

[fol. 10] Before United States Board of Tax Appeals

[Title omitted]

Answer—Filed March 10, 1931

The Commissioner of Internal Revenue by his attorney, General Counsel, Bureau of Internal Revenue, for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Denies all the material allegations contained in paragraph 1 of the petition, except the allegation that the petitioner is a corporation and admits said allegation.

2. Admits all the material allegations contained in paragraph 2 of the petition.

3. Admits all the material allegations contained in paragraph 3 of the petition, except the allegation as to the amount of tax in controversy and denies that the amount of tax in controversy is the amount shown in paragraph 3 of the petition.

4 (a). Denies that the respondent committed error in the determination of the deficiency as alleged in paragraph 4 of the petition.

4 (b). Denies that any error was made in the determination of the deficiency referred to in deficiency letter dated December 16, 1930.

5. Denies all the material allegations contained in paragraph 5 of the petition.

[fol. 11] 6. Denies generally and specifically each and every allegation in the petitioner's petition contained not hereinbefore admitted, qualified or denied.

Wherefore it is prayed that the petitioner's appeal be denied.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: J. Arthur Adams, Special Attorney, Bureau of Internal Revenue.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

STIPULATION OF FACTS—Filed at Hearing Oct. 5, 1932

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the following facts shall be taken as true and may be considered by the Board in its findings of fact and conclusions of law subject to the objection on the part of either party to any part thereof on the ground of relevancy.

1. The petitioner is a corporation organized under the laws of the State of Delaware on or about May 1, 1914, with its principal offices at 1310 Standard Oil Building, Balti-

more, Maryland, and for the calendar year 1928 filed its income tax return with the Collector of Internal Revenue at Baltimore, Maryland. Petitioner is engaged in the busi-
[fol. 12] ness of owning securities of, managing, and operating public utility properties.

2. On January 1, 1927, the petitioner corporation acquired 20,000 shares of no par value of the common capital stock, Certificate # C-2, (photostat copy of which is attached hereto and marked Exhibit A,) of another corporation, the Islands Edison Company. Said 20,000 shares of stock constituted one-half of the total 40,000 shares of common capital stock of said Islands Edison Company outstanding; the remaining 20,000 shares, Certificate # C-1, (photostat copy of which is attached hereto and marked Exhibit B,) were owned by Gillet and Company, Keyser Building, Baltimore, Maryland, which company is not connected with petitioner nor with petitioner's stockholders. Petitioner acquired said 20,000 shares of common capital stock of the Islands Edison Company at a cost to it of $2,000 and set up such stock on its books at a total value of $2,000.

3. During the month of January, 1928, Walter Whetstone, president of the Southern Cities Utilities Company, became interested in acquiring control of the Compania Electricia de Santo Domingo, the stock of which was owned by the Islands Edison Company. Upon inquiring of Gillet & Company, of Baltimore, he ascertained that the entire common stock outstanding of the Islands Edison Company was owned equally, as aforesaid, by Gillet & Company, of Baltimore, Maryland, and General Utilities & Operating Company, each company holding certificates for 20,000 shares. That during a conference with J. C. M. Lucas, president of the General Utilities & Operating Company, Mr. Whetstone discussed the purchase of the Santo Domingo Company or the Islands Edison Company common stock and as a result thereof was given permission to make an investigation of the properties of the Santo Domingo Company. That sometime in February of 1928 Mr. Whetstone informed Mr. Charles Gillet and Mr. J. C. M. Lucas that his plans required the delivery of all the common stock of the Islands Edison Company; that he was informed by Charles Gillet that his firm was ready and willing to make

the sale of the 20,000 shares owned by Gillet & Co. of the Islands Edison Company common stock and that he (Gillet) and Mr. Lucas, president of petitioner, had agreed upon [fol. 13] the price at which the sale would be made. Mr. Whetstone was informed by Mr. Lucas that if a sale of the 20,000 shares of the common stock of the Islands Edison Company then owned by the General Utilities & Operating Company was consummated such a sale would be made only after the General Utilities & Operating Company had distributed the Islands Edison Company shares to its stockholders, because they had been advised by their attorneys that if sale were made by General Utilities & Operating Company it would be subject to a tax on any profit realized on the sale and that when the proceeds of the sale were distributed to the stockholders the stockholders would have to pay another tax thereon. The price to be paid for the properties and generally the terms and conditions of the sale were agreed upon by Messrs. Gillet, Lucas and Whetstone, but no contract was entered into by them, it being understood and agreed between them that the General Utilities and Operating Company would make distribution of the common stock of the Islands Edison Company to its stockholders and that counsel would prepare a written agreement embodying the terms and conditions of the said sale, said agreement to be submitted for approval to the stockholders of the Islands Edison Company (after the distribution of said stock by the General Utilities and Operating Company).

It is stipulated and agreed that J. C. M. Lucas, if called as a witness in this proceeding, would testify as is shown in the affidavit attached hereto as Exhibit F.

4. On March 22, 1928 the following transpired at a meeting of the Board of Directors of the petitioner corporation as reflected by the minutes of said meeting:

"A meeting of the Board of Directors of the General Utilities and Operating Company was held this 22nd day of March, 1928, at the principal office of the Company, Standard Oil Building, Baltimore, Maryland, at eleven o'clock in the forenoon.

"Directors present: Messrs. George E. Warfield, E. McC. [fol. 14] Fisher, Frank B. Adams, Samuel P. Morton, Jr., J. C. M. Lucas and H. P. Lucas, constituting a majority and a quorum of the Board.

"Mr. J. C. M. Lucas, the President of the Company, presided, and Mr. H. P. Lucas, the Secretary of the Company, acted as Secretary of the meeting.

"A waiver of notice of the meeting, signed by Mr. E. H. Bankard, the remaining Director of the Company, who was not present at the meeting, was presented by the Secretary, and ordered filed.

"The Chairman called to the attention of the meeting the fact that the Company was carrying on its books 20,000 shares of Common Stock of the Islands Edison Company at a gross valuation of $2,000; he made an extended statement to the Board dealing with the development of and the present condition of the properties of that Company, its record of gross and net earnings and a forecast of the earnings which should be made in the immediate future as a result of extensions of facilities initiated and to a large extent completed; he stated that the officers of the Company after careful analysis of the properties and affairs of the Islands Edison Company, were of the opinion that the Common Stock of that Company which is owned by this Company is worth at least $1,122,500.00 and should be appreciated on the books of this Company to that amount; he explained that such an appreciation would, of course, involve a credit to surplus account of the Company arising from appreciation of assets and a debit to its asset account in the amount of $1,120,500.00.

"The Chairman also suggested to the meeting that the Company consider declaring a dividend on the Common Stock of the Company in the amount of $1,071,426.25, payable out of the appreciation so set up, the dividend to be paid in Common Stock of the Islands Edison Company at a value of $56.12½ a share.

"Whereupon the following resolutions were unanimously passed, viz:

[fol. 15] (a) that this Company appreciate on its books, its holdings of Common Stock of The Islands Edison Company in the amount of 20,000 shares in the amount of $1,120,500.00 and that the amount of this appreciation be credited to surplus arising from appreciation of assets;

(b) that a dividend in the amount of $1,071,426.25 be and it is hereby declared on the Common Stock of this Company, payable in Common Stock of The Islands Edison Company

at a valuation of $56.12½ a share, out of the surplus of the Company arising from the appreciation in the value of the Common Stock of The Islands Edison Company held by this Company, viz., $1,120,500.00, the payment of the dividend to be made by the delivery to the stockholders of this Company, pro rata, of certificates for the Common Stock of The Islands Edison Company held by this Company at the rate of two shares of such stock for each share of Common Stock of this Corporation; the stockholders entitled to be those of record at the close of business this day.

"There being no further business before the meeting it then adjourned."

5. The petitioner thereupon, on March 22, 1928, simultaneously entered on its books of account. in compliance with the foregoing resolution, the following entries:

1928.		Dr.	*Dr.*
Mar. 22.	Investments	1,120,500.00	
	Surplus arising from appreciation of assets		1,120,500.00
	To record the appreciation in the market value of the Company's holding of 20,000 shares of Common Stock of The Islands Edison Company as authorized by Board of Directors by resolution passed in meeting held		
[fol. 16]	22nd day of March, 1928.		
	20,000 shares cost	2,000.00	
	20,000 shares appreciated value	1,122,500.00	
		1,120,500.00	
Mar. 22.	Surplus arising from appreciation of assets	1,071,426.25	
	Dividends payable		1,071,426.25

To record dividend declared on the Common Stock of the Company, payable in Common Stock of The Islands Edison Company at a valuation of $56.12½ a share, out of the Surplus arising from the appreciation in the value of the Common Stock of the Islands Edison Company held by this Company, namely, $1,120,500, the payment of the dividend to be made by the delivery to the stockholders of this Company, pro rata, of certificates for the Common Stock of The Islands Edison Company held by this Company at the rate of two shares of such stock for each share of Common Stock of this Corporation; the stockholders entitled to be those of record at the close of business this day as authorized by the Board of Directors by resolution passed in meeting held 22nd day of March, 1928. Number of shares of this Company issued and outstanding at this date—9545.

[fol. 17]

Mar. 22.	Dividends payable	1,071,426.25	
	Investments		1,071,426.25

To record payment of dividend declared March 22, 1928, on the Common Stock of this Company, such payment being made by delivery of 19,090 shares of the Common Stock of The Islands Edison Company at a valuation of $56.12½ per share.

6. Thereupon, on March 22, 1928, in accordance with the resolution of the Board of Directors hereinabove set forth, the petitioner distributed to its own stockholders, 19,090 shares of the said common capital stock of the Islands Edison Company, such shares representing two shares of the Islands Edison Company stock theretofore owned by petitioner for each one share of the 9,545 shares of petitioners' own capital stock then outstanding. On such date, March 22, 1928, the said shares of stock were transferred on the stock records of the Islands Edison Company to the individuals receiving the distribution; the certificate, #C-2, theretofore issued to the petitioner was cancelled, and certificates #C-3 to 35 (photostats of which are attached hereto marked Exhibit C) were issued to the following individuals, [fol. 18] being the stockholders of petitioner corporation at that date who received such distribution:

Name	Number of shares
J. C. M. Lucas Company	6,740
Bessie M. Slagle	220
W. V. Horner	150
Cornelia R. Bryan	70
J. Harmanus Fisher & Sons	1,250
Edward McC. Fisher	140
Samuel P. Morton, Jr.	560
Georgia S. Foster	540
John Walter Smith Foster	550
Arthur D. Foster, Jr.	540
Eugene L. Norton	150
Rose J. Coleman	3,480
E. H. Bankard	500

Name	Number of shares
S. Baldwin, Jr.	130
Leo P. Harlow	230
May Gover	150
Henry T. Gover	150
J. E. Hutchinson, Jr.	150
Alvin O. Portner	500
Geo. E. Warfield	280
Benoit Baer, Jr.	100
Arthur K. Warfield	20
Edgar Warfield, Jr.	130
Virgil T. Bain	100
C. D. Hubbard	50
Anna Edgar Lucas	150
William F. Hall	100
Joseph A. Slattery	250
Victor C. Armstrong	100
H. H. Coleman	50
A. S. Swanson	20
M. A. Maxwell	550
J. B. Whitworth	990

After transfer of the 19,090 shares as aforesaid, there remained in the hands of petitioner 910 shares of stock of The Islands Edison Company, which 910 shares were retained by it and a new certificate, C-36 (photostat copy of which is attached and marked Exhibit "D") was issued to it on March 22, 1928.

[fol. 19] 7. On March 26, 1928, the stockholders of The Islands Edison Company (one of which was the petitioner, General Utilities and Operating Company, the owner of 910 shares of Islands Edison Company common stock) and the Southern Cities Utilities Company entered into a contract of sale of The Islands Edison Company common stock, a photostat copy of which contract is attached hereto and marked Exhibit "E"; that at no time did General Utilities and Operating Company agree with the aforesaid Walter Whetstone or the Southern Cities Utilities Company, verbally or in writing, to make sale to him or to the Southern Cities Utilities Company of any of said stock except the aforesaid 910 shares of the Islands Edison Company.

8. The fair market value of The Islands Edison Company common stock as of March 22, 1928, was $56.12½ per share,

said amount being computed in the aforesaid contract dated March 26, 1928, attached hereto as Exhibit E, as follows:

Total sales price as shown in contract	$3,375,000.00
Less: Liability for bonds and preferred stock outstanding	1,130,000.00
Net consideration for stock	$2,245,000.00

$2,245,000 divided by 40,000 shares equals $56.12½ per share.

9. The earned surplus from operations as of December 31, 1927, was $1,360,515.96, which amount was not impaired by operating losses prior to March 22, 1928. Such surplus and all the capital of the company at December 31, 1927, were invested at cost in assets of the company, of which assets only $41,152.00 was cash. On March 22, 1928, the total cash of petitioner was not more than $49,004.23.

10. The 910 shares of The Islands Edison Company common stock, Certificate #C-36, which were retained by the petitioner after the said distribution of 19,090 shares to its stockholders on March 22, 1928, as referred to in paragraph 6 of this stipulation, were sold to the Southern Cities Utili- [fol. 20] ties Company on May 14, 1928, in accordance with the provisions of paragraph 7 of this stipulation, and on which a profit of $46,346.30 was reported on the 1928 return as filed by the petitioner, computed in said return as follows:

Sales price of 910 shares at $51.25 per share	$46,437.30
Cost of 910 shares at 10¢ per share	91.00
Profit reported in return	$46,346.30

The difference between the amount of $56.12½ per share, set forth in paragraph 8 above as the price stated in the contract of March 26, 1928, and the amount of $51.25 as shown in this paragraph as the amount received on May 14, 1928, when sale was made, is represented by brokerage charges, commissions and other expenses incident to the consummation of the sale which were charged against the stockholders in accordance with paragraph Eighth of the contract dated March 26, 1928, attached hereto as Exhibit E.

11. The petitioner received no cash or other property for the distribution of said 19,090 shares of the Islands Edison Company common stock.

12. Petitioner corporation, in making its income tax return for the calendar year 1928, reported no income from the disposition of the 19,090 shares of the Islands Edison common stock. The Commissioner of Internal Revenue, upon auditing said return, has held that petitioner corporation derived a profit of $1,069,517.25 from the disposition thereof, the Commissioner's ruling thereon being in part, as follows:

"It is therefore held that your corporation realized a taxable gain of $1,069,517.25 upon the distribution of The Islands Edison Company stock in payment of the dividend of $1,071,426.25, as follows:

[fol. 21] Distribution of 19,090 shares of stock at market value of $56.125 a share in satisfaction of dividend obligation	$1,071,426.25
Cost of stock distributed, $0.10 a share	1,909.00
Profit realized	$1,069,517.25"

(Sgd.) R. Kemp Slaughter, (Sgd.) Hugh C. Bickford, Attorneys for Petitioner. (Sgd.) C. M. Charest, General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

PEW, 9/27/32.
RGW, 9/27/32.

EXHIBIT "F" TO STIPULATION OF FACTS

CITY OF BALTIMORE,
State of Maryland, ss:

J. C. M. Lucas being duly sworn according to law deposes and says as follows:

1. That I am President of General Utilities & Operating Company, a corporation of the State of Delaware, with its executive offices in the City of Baltimore, Maryland, and that I have been President of said Company since its organization on the 1st day of May, 1914.

2. That I was present at the meeting of the Board of Directors of said Company, held March 22, 1928, at which common stock of The Islands Edison Company was ordered to be distributed to the stockholders of General Utilities & Operating Company; that the contract for the sale of said stock and all matters in connection with said transaction were handled by counsel and I had no part in the preparation thereof; that I have no recollection of any contract having been prepared in which I was named as one party to the agreement as "Seller" and Southern Cities Utilities Company, the other party, as "Purchaser"; that the entire [fol. 22] proceedings of the Board of Directors of General Utilities & Operating Company appear in the corporate record book of said Company and the agreement for sale of said stock was entered into by all of the stockholders of The Islands Edison Company and Southern Cities Utilities Company after General Utilities & Operating Company had made distribution of said stock to its stockholders; that my recollection of the transaction leading up to and the execution of the contract between the stockholders of The Islands Edison Company and Southern Cities Utilities Company accords with the facts as set forth in an affidavit heretofore made by Walter Whetstone, President of Southern Cities Utilities Company, which has heretofore been filed with the Commissioner of Internal Revenue or one of the Departments before which the tax assessment against General Utilities & Operating Company has been considered.

3. That the irrevocable powers of attorney attached to the shares of stock in the names of the individual owners were not executed by the individuals prior to March 22, 1928, when said stock was distributed to them by General Utilities & Operating Company, but same were executed after the distribution of said stock and prior to the execution of the contract of March 26, 1928; although some of said powers of attorney may have been executed after March 26, 1928, but none prior to March 22, 1928.

4. That I did not have power of attorney from the Board of Directors of General Utilities & Operating Company at any time to dispose of the common stock of The Islands Edison Company; that the entire proceedings of the Board of Directors of said Company are set forth in the corporate record book of said Company and said proceedings do not

show any authority to me at any time to dispose of such stock.

5. That I did not have power of attorney from Gillet & Company or a bill of sale from them, either to me or General Utilities & Operating Company, for the sale of common stock of The Islands Edison Company owned by Gillet & Company; that said Gillet & Company joined with the other stockholders of The Islands Edison Company in the [fol. 23] execution of the contract of March 26, 1928, and delivered their stock with irrevocable power of attorney attached to The Pennsylvania Company for Insurance on Lives and Granting Annuities, with authority to said Company to make delivery of such certificates at settlement.

J. C. M. Lucas.

Sworn to and subscribed before me this 24th day of September, 1932.

Agnes A. Sandkuhler.

Before United States Board of Tax Appeals

Docket No. 52770

Promulgated April 24, 1933

General Utilities & Operating Company, Petitioner,

v.

Commissioner of Internal Revenue, Respondent

Findings of Fact and Opinion

A dividend declared by petitioner corporation, payable in stock of another corporation and so paid, did not give rise to taxable gain.

R. Kemp Slaughter, Esq., Hugh C. Bickford, Esq., and Joseph A. Slattery, Esq., for the petitioner.

William E. Davis, Esq., and Paul E. Waring, Esq., for the respondent.

The respondent has determined a deficiency in income tax in the amount of $128,342.07 for the calendar year 1928.

The only question presented in this proceeding for redetermination is whether petitioner realized taxable gain in declaring a dividend and paying it in the stock of another [fol. 24] company at an agreed value per share, which value was in excess of the cost of the stock to petitioner.

Findings of Fact

1. The petitioner is a Delaware corporation, with its principle offices at Baltimore, Maryland. It is engaged in the business of owning securities of, managing, and operating public utility properties.

2. On January 1, 1927, the petitioner acquired 20,000 shares of no par value of the common capital stock of another corporation, the Islands Edison Company. Said 20,000 shares of stock constituted one-half of the total common capital stock of said Islands Edison Company outstanding; the remaining 20,000 shares were owned by Gillet & Company, which company is not connected with petitioner nor with petitioner's stockholders. Petitioner acquired said 20,000 shares of common capital stock of the Islands Edison Company at a cost to it of $2,000 and set up such stock on its books at a total value of $2,000.

3. During the month of January, 1928, Walter Whetstone, president of the Southern Cities Utilities Company, became interested in acquiring control of a Santo Domingo company, the stock of which was owned by the Islands Edison Company. Upon inquiring of Gillet & Company he ascertained that the entire common stock outstanding of the Islands Edison Company was owned equally, as aforesaid, by Gillet & Company and petitioner. During a conference with J. C. M. Lucas, president of petitioner, Whetstone discussed the purchase of the Santo Domingo Company or the Islands Edison Company common stock and as a result thereof was given permission to make an investigation of the properties of the Santo Domingo Company. Sometime in February of 1928 Whetstone informed Gillet and Lucas that his plans required the delivery of all the common stock of the Islands Edison Company, that he was informed by Gillet that his firm was ready and willing to make the sale of the 20,000 shares owned by Gillet & Company of the Islands Edison Company common stock, and that he (Gillet) and Lucas, president of petitioner, had agreed upon the price

[fol. 25] at which the sale would be made. Whetstone was informed by Lucas that if a sale of the 20,000 shares of the common stock of the Islands Edison Company then owned by the petitioner were consummated such a sale would be made only after petitioner had distributed the Islands Edison Company shares to its stockholders, because they had been advised by their attorneys that if sale were made by petitioner it would be subject to a tax on any profit realized on the sale and that when the proceeds of the sale were distributed to the stockholders the stockholders would have to pay another tax thereon. The price to be paid for the properties and generally the terms and conditions of the sale were agreed upon by Gillet, Lucas, and Whetstone, but no contract was entered into by them, it being understood and agreed between them that petitioner would make distribution of the stock of the Islands Edison Company to its stockholders and that counsel would prepare a written agreement embodying the terms and conditions of the said sale, said agreement to be submitted for approval to the stockholders of the Islands Edison Company after the distribution of said stock by the petitioner. Lucas never held power of attorney to sell said stock for the petitioner or its stockholders.

4. At a meeting of petitioner's directors on March 22, 1928, the matter of petitioner's stockholdings in the Islands Edison Company was discussed and it was reported as the opinion of petitioner's officers that the stock was worth at least $1,122,500 and that it should be appreciated on petitioner's books to that figure. Further matters discussed and action taken at that meeting are recorded in the minutes as follows:

The Chairman also suggested to the meeting that the Company considered declaring a dividend on the Common Stock of the Company in the amount of $1,071,426.25, payable out of the appreciation so set up, the dividends to be paid in Common Stock of the Islands Edison Company at a value of $56.12½ a share.

Whereupon the following resolutions were unanimously passed, viz:

(a) that this Company appreciate on its books, its holdings of Common Stock of The Islands Edison Company in [fol. 26] the amount of 20,000 shares in the amount of

$1,120,500.00 and that the amount of this appreciation be credited to surplus arising from appreciation of assets;

(b) that a dividend in the amount of $1,071,426.25 be and it is hereby declared on the Common Stock of this Company payable in Common Stock of The Islands Edison Company at a valuation of $56.12½ a share, out of the surplus of the Company arising from the appreciation in the value of the Common Stock of The Islands Edison Company held by this Company, viz, $1,120,500.00, the payment of the dividend to be made by the delivery to the stockholders of this Company pro rata, of certificates for the Common Stock of The Islands Edison Company held by this Company at the rate of two shares of such stock for each share of Company Stock of this Corporation; the stockholders entitled to be those of record at the close of business this day.

There being no further business before the meeting, it then adjourned.

5. The petitioner thereupon, on March 22, 1928, simultaneously entered on its books of account, in compliance with the foregoing resolution, the following entries, with full explanation following each entry, only part of which is here set forth:

1928		Dr.	Cr.
March 22.	Investments	$1,120,500.00	
	Surplus arising from appreciation of assets		$1,120,500.00
March 22.	Surplus arising from appreciation of assets	1,071,426.25	
	Dividends payable		1,071,426.25
	To record dividend declared on the Common Stock of the Company, payable in Common Stock of The		
[fol. 27]	Islands Edison Company at a valuation of $56.12½ a share, * * *		
March 22.	Dividends payable	1,071,426.25	
	Investments		1,071,426.25
	To record payment of dividends declared March 22, 1928, on the Common Stock of this Company, such payment being made by delivery of 19,090 shares of the Common Stock of The Islands Edison Company at a valuation of $56.12½ per share.		

6. Thereupon, on March 22, 1928, in accordance with the resolution of the directors the petitioner distributed to its own stockholders, 19,090 shares of the stock of the Islands

Edison Company, such shares representing two shares of the Islands Edison Company stock theretofore owned by petitioner for each one share of the 9,545 shares of petitioner's own capital stock then outstanding. On the same date, March 22, 1928, the shares of stock were transferred on the stock records of the Islands Edison Company to the individuals receiving the distribution. After transfer of the 19,090 shares, there remained in the hands of petitioner 910 shares of stock of the Islands Edison Company, which 910 shares were retained by it and a new certificate for such shares was issued to it on March 22, 1928.

7. On March 26, 1928, the stockholders of the Islands Edison Company (one of which was the petitioner, owning 910 shares) and the Southern Cities Utilities Company, entered into a written contract of sale of the Islands Edison Company stock. At no time did petitioner agree with Whetstone or the Southern Cities Utilities Company, verbally or in writing, to make sale to him or to the Southern Cities Utilities Company of any of said stock except the [fol. 28] aforesaid 910 shares of the Islands Edison Company.

8. The fair market value of the Islands Edison Company stock as of March 22, 1928, was $56.12½ per share, said amount being computed in the contract dated March 26, 1928, as follows:

Total sales price	$3,375,000
Less: Liability for bonds and preferred stock outstanding	1,130,000
Net consideration for stock	$2,245,000

The net consideration, $2,245,000, divided by the number of shares, 40,000, gives a quotient of $56.12½ per share.

9. Petitioner's earned surplus from operations as of December 31, 1927, was $1,360,515.96, which amount was not impaired by operating losses prior to March 22, 1928. Such surplus and all the capital of the petitioner at December 31, 1927, were invested at cost in assets of the company, of which assets only $41,152 was cash. On March 22, 1928, the total cash of petitioner was not more than $49,004.23.

10. The 910 shares of the Islands Edison Company common stock which were retained by the petitioner after the distribution of 19,090 shares to its stockholders on March 22, 1928, were sold to the Southern Cities Utilities Company on May 14, 1928, and a profit of $46,346.30 was reported on the 1928 return filed by the petitioner, computed as follows:

Sale price of 910 shares at $51.25 per share	$46,437.30
Cost of 910 shares at 10¢ per share	91.00
Profit reported in return	$46,346.30

The difference between the amount of $56.12½ per share, set forth above as the price stated in the contract of March 26, 1928, and the amount of $51.25 as shown in this paragraph as the amount received on May 14, 1928, when sale was made, is represented by brokerage charges, commissions [fol. 29] and other expenses incident to the consummation of the sale which were charged against the stockholders in accordance with the provision of the contract.

11. The petitioner received no cash or other property for the distribution of said 19,090 shares of the Islands Edison Company common stock.

12. Petitioner, in making its income tax return for the calendar year 1928, reported no income from the disposition of the 19,090 shares of the Islands Edison common stock. The respondent upon auditiing the return, has held that petitioner corporation derived a profit of $1,069,517.25 from the disposition thereof, the explanation in the notice of deficiency being in part as follows:

It is therefore held that your corporation realized a taxable gain of $1,069,517.25 upon the distribution of The Islands Edison Company stock in payment of the dividend of $1,071,426.25, as follows:

Distribution of 19,090 shares of stock at market value of $56.125 a share in satisfaction of dividend obligation	$1,071,426.25
Cost of stock distributed, $0.10 a share	1,909.00
Profit realized	$1,069,517.25

OPINION

ARUNDELL:

The respondent has determined that income was realized from the transactions detailed in the findings of fact and has asserted a tax thereon. His theory is that upon the declaration of the dividend on March 22, 1928, petitioner became indebted to its stockholders in the amount of $1,071,426.25, and that the discharge of that liability by the delivery of property costing less than the amount of the debt constituted income, citing Kirby Lumber Co. v. United States, 284 U. S. 1.

There are a number of decided cases somewhat similar to this, in some of which it has been held that the distributions resulted in gain or loss to the distributing cor- [fol. 30] poration. See Callanan Road Improvement Co., 12 B. T. A. 1109; Bacon-McMillan Veneer Co., 20 B. T. A. 556. In those cases the dividend resolutions were construed as declaring dividends in definite amounts "*before* the property was distributed in kind." Bacon-McMillan Veneer Co., supra, p. 559. In this last cited case it was further said:

If, on the other hand, instead of providing for a definite percentage in the way of a dividend, if the resolution had merely provided that the Liberty bonds should be distributed by way of dividends, a different situation would have been presented which is clearly distinguishable from the case we have before us.

A situation like that mentioned in the quotation just given was present in First Utah Savings Bank, 17 B. T. A. 804; affd., 53 Fed. (2d) 919. There the banking corporation owned the stock of another company, which stock was held by trustees, and the bank's directors by resolution directed the trustees "to deliver as a dividend" a designated number of shares of the stock. "No cash dividend had been declared by the bank as a part of this transaction." 53 Fed. (2d) 920. The stock at the time of distribution was worth less than cost. We held:

The petitioner, by resolution of its board of directors, of October 17, 1922, only incurred an obligation to distribute the 9,000 shares of Amalgamated Sugar Co. stock to its stockholders, which obligation it fully discharged without

loss to it, by making the distribution of the stock as directed.

The facts in this case are somewhat analogous to those in Hollenberg Music Co., 6 B. T. A. 421, 425, wherein we said—referring to a dividend declared by the petitioner:

• • • If, as the resolution of February 6, 1917, indicates, the petitioner merely distributed the property interest along with other dividends, we are unable to see that loss, contingent or otherwise, resulted from the distribution. • • •

The Court of Appeals of the District of Columbia in affirming our decision said:

[fol. 31] It is true that the rule hereby adopted leads to an anomalous result, inasmuch as appellant at the time of transferring the stock had suffered an actual loss of value measured by the difference between the cost of the transferred stock and its then market price, for which no deduction is allowed. But, on the other hand, according to the same rule if the transferred stock had enhanced in value between its purchase and transfer no taxable gain would have been charged against the corporation because of that fact.

From the above cases the rule is deducible that, where the dividend resolution imposes only the obligation to distribute in kind and it is discharged in that way, no gain or loss results to the corporation. Counsel for respondent in his brief concedes this to be the correct view.

Our question then is to determine whether the resolution of March 22, 1928, was one declaring a dividend of an amount of money, or whether it declared a dividend payable in stock of the Islands Edison Company. The second paragraph of the resolution opens with the statement: "That a dividend in the amount of $1,071,426.25 be and it is hereby declared on the common stock of this Company • • •." The respondent would have us stop reading here. This, however, is only part of the resolution, and the part that immediately follows is of equal importance. The next clause limits as clearly as words can the medium of discharge of the dividend liability. Without separation by as much as a punctuation mark from the part of the resolution just quoted, the words are: "payable in common stock of the Islands Edison Company • • •." Where

the method of payment is prescribed a stockholder is not entitled to payment in some other form. In State v. B. & O. R. R., 6 Gill (Md.) 363, the railroad company had declared a dividend, payable in cash to holders of less than 50 shares, and payable part in cash and part in its own bonds to holders of 50 shares or more. The State of Maryland, being the owner of more than 50 shares, sued for a cash payment of the entire amount. The court denied recovery, saying in part:

It is immaterial in our view of the subject, whether the declaration of a dividend constitutes a contract, or is to be considered in the light of a performance of a duty. In [fol. 32] either case, *it is to be taken as it emanates from the board. A part of it cannot be taken and the rest discarded.* It cannot be said you have declared three per cent and we will have the money, although in the very declaration, they say they can only pay you in liabilities of the company. P. 386.

The intent of the directors of petitioner was to declare a dividend payable in Islands Edison stock; their intent was expressed in that way in the resolution formally adopted; and the dividend was paid in the way intended and declared. We so construe the transaction, and on authority of First Utah Savings Bank, supra, we hold that the declaration and payment of the dividend resulted in no taxable income.

Decision will be entered for the petitioner.

BEFORE UNITED STATES BOARD OF TAX APPEALS,

Washington

Docket No. 52770

GENERAL UTILITIES & OPERATING CO., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

Pursuant to the Board's findings of fact and opinion, promulgated April 24, 1933, it is

Ordered and decided that there is no deficiency in income tax for the year 1928.

Enter.

(Signed) C. Rogers Arundell, Member, United States Board of Tax Appeals.

Entered Apr. 27, 1933.

[fol. 33] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

MOTION FOR REHEARING, ETC.—Filed May 17, 1933

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and moves that the Chairman of the Board direct that the decision of the Division of the Board in this proceeding be reconsidered by the Board and that the Board recall its decision in this proceeding promulgated April 24, 1933, and grant a rehearing, if such rehearing is deemed necessary.

For cause it is stated that the principle involved is one of great importance in the administration of the income tax laws and is contrary to a long established practice of the Bureau of Internal Revenue. Further, it appears that the Board's decision is contrary to, and cannot be reconciled with, its decisions in Bacon-McMillan Veneer Company, 20 B. T. A. 556, and Callanan Road Improvement Company, 12 B. T. A. 1109. The question involved is whether or not the petitioner realized taxable gain in the declaration of a dividend in a specific amount and discharging such dividend in Islands Edison Company stock at an agreed value per share, which value was in excess of the cost of such stock to the petitioner. It was the contention of the respondent that the petitioner when it liquidated a definite dividend obligation to its stockholders by turning over to such stockholders an asset which cost the petitioner less than the face of the dividend a profit resulted therefrom to the petitioner. It was the position of the petitioner, which position was sustained by the Board, that the resolution constituted the [fol. 34] declaration of a dividend in kind and no tax liability in respect thereto arose to the petitioner.

The dividend resolution in the Bacon-McMillan Veneer Company case, 20 B. T. A. 556-557, reads:

"Dividends. It was moved by Mr. Frazer and seconded by Mr. Denner that a 50% dividend be declared and made payable in Liberty Loan Bonds in denominations of $1,000 each at their market value this date and all odd hundred of dollars and cents in cash".

The resolution in the case now under consideration is quoted on page 3 of the Board's decision and reads in part as follows:

"* * * That a dividend in the amount of $1,071,426.25 be and it is hereby declared * * * payable in common stock of the Islands Edison Company at a valuation of $56.12½ a share * * * payment of the dividend to be made by delivery to the stockholders of this company pro rata of certificates for the common stock of the Islands Edison Company held by this company at the rate of two shares of such stock for each 'share of the Company stock of this corporation'."

Under the resolution in the Bacon-McMillan Veneer Company appeal the Board held that a dividend of a definite amount paid in Liberty bonds of a value in excess of cost gives rise to taxable gain.

In the instant appeal the Board held that a dividend declared by the petitioner corporation payable in stock of another corporation and so paid did not give rise to taxable gain.

The decision in the instant case is clearly contrary to the decision of the Board in the case of Bacon-McMillan Veneer Company.

In view of the apparent conflict between those decisions of the Division of the Board, which have become the decisions of the Board, respondent finds that considerable administrative difficulty has arisen particularly from the standpoint of the administration of the tax law, in this re- [fol. 35] spect, by the revenue agents in the field. Because of the patent conflict and because of this administrative difficulty, it is prayed that this motion be granted to the end that the said conflict might be eliminated.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue. Of counsel: William E. Davis and Paul E. Waring, Special Attorneys, Bureau of Internal Revenue.

BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

[Title omitted]

ORDER RECALLING REPORT AND DETERMINATION, ETC.

Upon consideration of the motion filed by counsel for the respondent to refer the report and determination in this proceeding, promulgated under date of April 24, 1933, to the Board for review, it is

Ordered that said motion be and the same is hereby denied. And it is further

Ordered that said report and determination be and the same is hereby recalled and the proceeding referred to Division No. 4 for consideration and report. And it is further

Ordered that the decision based on said report entered [fol. 36] under date of April 27, 1933 be and the same is hereby vacated, set aside and made for naught.

By the Board.

(Signed) Logan Morris, Chairman.

Dated: Washington, D. C., May 26, 1933.

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 52770

Promulgated January 30, 1934

GENERAL UTILITIES & OPERATING COMPANY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Findings of Fact and Opinion

A dividend declared by petitioner corporation, payable in stock of another corporation and so paid, did not give rise to taxable gain.

R. Kemp Slaughter, Esq., Hugh C. Bickford, Esq., and Joseph A. Slattery, Esq., for the petitioner.

William E. Davis, Esq., and Paul E. Waring, Esq., for the respondent.

The respondent has determined a deficiency in income tax in the amount of $128,342.07 for the calendar year 1928. The only question presented in this proceeding for redetermination is whether petitioner realized taxable gain in declaring a dividend and paying it in the stock of another company at an agreed value per share, which value was in excess of the cost of the stock to petitioner.

[fol. 37] FINDINGS OF FACT

1. The petitioner is a Delaware corporation, with its principal offices at Baltimore, Maryland. It is engaged in the business of owning securities of, managing, and operating public utility properties.

2. On January 1, 1927, the petitioner acquired 20,000 shares of no par value of the common capital stock of another corporation, the Islands Edison Company. Said 20,000 shares of stock constituted one-half of the total common capital stock of the Islands Edison Company outstanding; the remaining 20,000 shares were owned by Gillet & Company, which company is not connected with petitioner nor with petitioner's stockholders. Petitioner acquired the 20,000 shares of common capital stock of the Islands Edison Company at a cost to it of $2,000 and set up such stock on its books at a total value of $2,000.

3. During the month of January, 1928, Walter Whetstone, president of the Southern Cities Utilities Company, became interested in acquiring control of a Santo Domingo company, the stock of which was owned by the Islands Edison Company. Upon inquiring of Gillet & Company he ascertained that the entire common stock outstanding of the Islands Edison Company was owned equally, as aforesaid, by Gillet & Company and petitioner. During a conference with J. C. M. Lucas, president of petitioner, Whetstone discussed the purchase of the Santo Domingo Company or the Islands Edison Company common stock and as a result thereof was given permission to make an investigation of the properties of the Santo Domingo Company. Sometime in February of 1928 Whetstone informed Gillet and Lucas that his plans required the delivery of all the common stock of the Islands Edison Company, that he was informed by Gillet that his firm was ready and willing to make the sale of the 20,000 shares owned by Gillet & Company of

the Islands Edison Company common stock and that he (Gillet) and Lucas, president of petitioner, had agreed upon the price at which the sale would be made. Whetstone was informed by Lucas that if a sale of the 20,000 shares of the common stock of the Islands Edison Company then owned by the petitioner were consummated such [fol. 38] a sale would be made only after petitioner had distributed the Islands Edison Company shares to its stockholders, because they had been advised by their attorneys that if sale were made by petitioner it would be subject to a tax on any profit realized on the sale and that when the proceeds of the sale were distributed to the stockholders, the stockholders would have to pay another tax thereon. The price to be paid for the properties and the terms and conditions of the sale generally were agreed upon by Gillet, Lucas, and Whetstone, but no contract was entered into by them, it being understood and agreed between them that petitioner would make distribution of the stock of the Islands Edison Company to its stockholders and that counsel would prepare a written agreement embodying the terms and conditions of the sale, the agreement to be submitted for approval to the stockholders of the Islands Edison Company after the distribution of said stock by the petitioner. Lucas never held power of attorney to sell the stock for the petitioner or its stockholders.

4. At a meeting of petitioner's directors on March 22, 1928, the matter of petitioner's stockholdings in the Islands Edison Company was discussed and it was reported as the opinion of petitioner's officers that the stock was worth at least $1,122,500 and that it should be appreciated on petitioner's books to that figure. Further matters discussed and action taken at that meeting are recorded in the minutes as follows:

The Chairman also suggested to the meeting that the Company considered declaring a dividend on the Common Stock of the Company in the amount of $1,071,426.25, payable out of the appreciation so set up, the dividends to be paid in Common Stock of the Islands Edison Company at a value of $56.12½ a share.

Whereupon the following resolutions were unanimously passed, viz:

(a) that this Company appreciate on its books, its holdings of Common Stock of The Islands Edison Company in the amount of 20,000 shares in the amount of $1,120,500.00 and that the amount of this appreciation be credited to surplus arising from appreciation of assets;

[fol. 39] (b) that a dividend in the amount of $1,071,426.25 be and it is hereby declared on the Common Stock of this Company payable in Common Stock of The Islands Edison Company at a valuation of $56.12½ a share, out of the surplus of the Company arising from the appreciation in the value of the Common Stock of The Islands Edison Company held by this Company, viz, $1,120,500.00, the payment of the dividend to be made by the delivery to the stockholders of this Company pro rata, of certificates for the Common Stock of The Islands Edison Company held by this Company at the rate of two shares of such stock for each share of Company Stock of this Corporation; the stockholders entitled to be those of record at the close of business this day.

There being no further business before the meeting, it then adjourned.

5. The petitioner thereupon, on March 22, 1928, simultaneously entered on its books of account, in compliance with the foregoing resolution, the following entries, with full explanation following each entry, only part of which is here set forth:

1928		Dr.	Cr.
March 22.	Investments	$1,120,500.00	
	Surplus arising from appreciation of assets		$1,120,500.00
March 22.	Surplus arising from appreciation of assets	1,071,426.25	
	Dividends payable		1,071,426.25
	To record dividend declared on the Common Stock of the Company, payable in Common Stock of The Islands Edison Company at a valuation of $56.12½ a share, * * *		
March 22.	Dividends payable	1,071,426.25	
	Investments		1,071,426.25
[fol. 40]	To record payment of dividends declared March 22, 1928, on the Common Stock of this Company, such payment being made by delivery of 19,090 shares of the Common Stock of The Islands Edison Company at a valuation of $56.12½ per share.		

6. Thereupon, on March 22, 1928, in accordance with the resolution of the Directors the petitioner distributed to its own stockholders, 19,090 shares of the stock of the Islands Edison Company, such shares representing two shares of the Islands Edison Company stock theretofore owned by petitioner for each one share of the 9,545 shares of petitioner's own capital stock then outstanding. On the same date, March 22, 1928, the shares of stock were transferred on the stock records of the Islands Edison Company to the individuals receiving the distribution. After transfer of the 19,090 shares, there remained in the hands of petitioner 910 shares of stock of the Islands Edison Company, which 910 shares were retained by it and a new certificate for such shares was issued to it on March 22, 1928.

7. On March 26, 1928, the stockholders of the Islands Edison Company (one of which was the petitioner, owning 910 shares) and the Southern Cities Utilities Company, entered into a written contract of sale of the Islands Edison Company stock. At no time did petitioner agree with Whetstone or the Southern Cities Utilities Company, verbally or in writing, to make sale to him or to the Southern Cities Utilities Company of any of said stock except the 910 shares of the Islands Edison Company.

8. The fair market value of the Islands Edison Company stock as of March 22, 1928, was $56.12½ per share, said amount being computed in the contract dated March 26, 1928, as follows:

[fol. 41] Total sales price	$3,375,000
Less: Liability for bonds and preferred stock outstanding	1,130,000
Net consideration for stock	$2,245,000

The net consideration, $2,245,000, divided by the number of shares, 40,000, gives a quotient of $56.12½ per share.

9. Petitioner's earned surplus from operations as of December 31, 1927, was $1,360,515.96, which amount was not impaired by operating losses prior to March 22, 1928. Such surplus and all the capital of the petitioner at December 31, 1927, were invested at cost in assets of the company, of which assets only $41,152 was cash. On March 22,

1928, the total cash of petitioner was not more than $49,004.23.

10. The 910 shares of the Islands Edison Company common stock which were retained by the petitioner after the distribution of 19,090 shares to its stockholders on March 22, 1928, were sold to the Southern Cities Utilities Company on May 14, 1928, and a profit of $46,346.30 was reported on the 1928 return filed by the petitioner, computed as follows:

Sale price of 910 shares at $51.25 per share	$46,437.30
Cost of 910 shares at 10¢ per share	91.00
Profit reported in return	$46,346.30

The difference between the amount of $56.12½ per share, set forth above as the price stated in the contract of March 26, 1928, and the amount of $51.25 as shown in this paragraph as the amount received on May 14, 1928, when sale was made, is represented by brokerage charges, commissions and other expenses incident to the consummation of the sale which were charged against the stockholders in accordance with the provisions of the contract.

11. The petitioner received no cash or other property for the distribution of the 19,090 shares of the Islands Edison Company common stoock.

[fol. 42] 12. Petitioner, in making its income tax return for the calendar year 1928, reported no income from the disposition of the 19,090 shares of the Islands Edison common stock. The respondent upon auditing the return, has held that petitioner corporation derived a profit of $1,069,517.25 from the disposition thereof, the explanation in the notice of deficiency being in part as follows:

It is therefore held that your corporation realized a taxable gain of $1,069,517.25 upon the distribution of The Islands Edison Company stock in payment of the dividend of $1,071,426.25, as follows:

Distribution of 19,090 shares of stock at market value of $56.125 a share in satisfaction of dividend obligation	$1,071,426.25
Cost of stock distributed, $0.10 a share	1,909.00
Profit realized	$1,069,517.25

OPINION

ARUNDELL:

The respondent has determined that income was realized from the transactions detailed in the findings of fact and has asserted a tax thereon. His theory is that upon the declaration of the dividend on March 22, 1928, petitioner became indebted to its stockholders in the amount of $1,071,426.25, and that the discharge of that liability by the delivery of property costing less than the amount of the debt constituted income, citing Kirby Lumber Co. v. United States, 284 U. S. 1.

There are a number of decided cases somewhat similar to this, in some of which it has been held that the distributions resulted in gain or loss to the distributing corporation. See Callanan Road Improvement Co., 12 B. T. A. 1109; Bacon-McMillan Veneer Co., 20 B. T. A. 556. In those cases the dividend resolutions were construed as declaring dividends in definite amounts "*before* the property was distributed in kind." Bacon-McMillan Veneer Co., supra, p. 559. In this last cited case it was further said:

If, on the other hand, instead of providing for a definite [fol. 43] percentage in the way of a dividend, if the resolution had merely provided that the Liberty bonds should be distributed by way of dividends, a different situation would have been presented which is clearly distinguishable from the case we have before us.

A situation like that mentioned in the quotation just given was present in First Utah Savings Bank, 17 B. T. A. 804; affd., 53 Fed. (2d) 919. There the banking corporation owned the stock of another company, which stock was held by trustees, and the bank's directors by resolution directed the trustees "to deliver as a dividend" a designated number of shares of the stock. "No cash dividend had been declared by the bank as a part of this transaction." 53 Fed. (2d) 920. The stock at the time of distribution was worth less than cost. We held:

The Petitioner, by resolution of its board of directors, of October 17, 1922, only incurred an obligation to distribute the 9,000 shares of Amalgamated Sugar Co. stock to its stockholders, which obligation it fully discharged with-

out loss to it, by making the distribution of the stock as directed.

The facts in this case are somewhat analogous to those in Hollenberg Music Co., 6 B. T. A. 421, 425, wherein we said—referring to a dividend declared by the petitioner:

> • • • If, as the resolution of February 6, 1917 indicates, the petitioner merely distributed the property interest along with other dividends, we are unable to see that loss, contingent or otherwise, resulted from the distribution. • • •

The Court of Appeals of the District of Columbia in affirming our decision said:

> It is true that the rule hereby adopted leads to an anomalous result, inasmuch as appellant at the time of transferring the stock had suffered an actual loss of value measured by the difference between the cost of the transferred stock and its then market price, for which no deduction is allowed. But, on the other hand, according to the same rule if the transferred stock had enhanced in value between its pur- [fol. 44] chase and transfer no taxable gain would have been charged against the corporation because of that fact.

From the above cases the rule is deducible that, where the dividend resolution imposes only the obligation to distribute in kind and it is discharged in that way, no gain or loss results to the corporation. Counsel for respondent in his brief concedes this to be the correct view.

Our question then is to determine whether the resolution of March 22, 1928, was one declaring a dividend of an amount of money, or whether it declared a dividend payable in stock of the Islands Edison Company. The second paragraph of the resolution opens with the statement: "That a dividend in the amount of $1,071,426.25 be and it is hereby declared on the common stock of this Company • • •." The respondent would have us stop reading here. This, however, is only part of the resolution, and the part that immediately follows is of equal importance. The next clause limits as clearly as words can the medium of discharge of the dividend liability. Without separation by as much as a punctuation mark from the part of the

resolution just quoted, the words are: "payable in common stock of the Islands Edison Company • • •." Where the method of payment is prescribed a stockholder is not entitled to payment in some other form. In State v. B. & O. R. R., 6 Gill (Md.) 363, the railroad company had declared a dividend, payable in cash to holders of less than 50 shares, and payable part in cash and part in its own bonds to holders of 50 shares or more. The State of Maryland, being the owner of more than 50 shares, sued for a cash payment of the entire amount. The court denied recovery, saying in part:

It is immaterial in our view of the subject, whether the declaration of a dividend constitutes a contract, or is to be considered in the light of a performance of a duty. In either case, *it is to be taken as it emanates from the board. A part of it cannot be taken and the rest discarded.* It cannot be said you have declared three per cent. and we will have the money, although in the very declaration, they say they can only pay you in liabilities of the company. (P. 386.)

The intent of the directors of petitioner was to declare [fol. 45] a dividend payable in Islands Edison stock; their intent was expressed in that way in the resolution formally adopted; and the dividend was paid in the way intended and declared. We so construe the transaction, and on authority of First Utah Saving Bank, supra, we hold that the declaration and payment of the dividend resulted in no taxable income.

Reviewed by the Board.

Decision will be entered for the petitioner.

Black, Lansdon, Sternhagen, Murdock, Seawell, and Adams dissent.

BEFORE UNITED STATES BOARD OF TAX APPEALS,

Washington

Docket No. 52770

GENERAL UTILITIES AND OPERATING COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

Pursuant to the Board's findings of fact and opinion, promulgated January 30, 1934, it is

Ordered and decided that there is no deficiency in income tax for the calendar year 1928.

Enter.

(Signed) C. Rogers Arundell, Member, United States Board of Tax Appeals.

Entered Feb. 2, 1934.

[fol. 46] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Title omitted]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR—Filed April 23, 1934

To the Honorable Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

Comes now Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys Frank J. Wideman, Assistant Attorney General, Robert H. Jackson, General Counsel, Bureau of Internal Revenue, and Paul E. Waring, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

That he is the duly qualified and acting Commissioner of Internal Revenue holding his office by virtue of the laws of the United States; that the General Utilities and Operating Company, the respondent under review, hereinafter called the respondent, is a corporation existing under and by virtue of the laws of Delaware with its principal place of business

at Baltimore, Maryland; that the income tax return of the respondent for the year 1928, the period here involved, was filed with the Collector of Internal Revenue at Baltimore, Maryland, and that the office of said Collector is located within the jurisdiction of the said Circuit Court of Appeals for the Fourth Circuit.

The Commissioner of Internal Revenue determined a deficiency in income tax against the respondent for the calendar year 1928 of $128,342.07 and on December 16, 1930, sent to it by registered mail a notice of said deficiency in ac- [fol. 47] cordance with the provisions of Section 272 of the Revenue Act of 1928. Thereafter, on February 12, 1931, the respondent filed an appeal from said notice of deficiency with the United States Board of Tax Appeals.

On September 28, 1932, the case was submitted to the Board of Tax Appeals for its decision on an agreed statement of facts. The Board under date of April 24, 1933, promulgated its opinion and on April 27, 1933, entered its decision and order of redetermination in accordance with its opinion wherein and whereby it was ordered and decided that for the calendar year 1928 there is no deficiency in income tax due from the respondent.

On May 17, 1933, a motion was filed by the Government requesting the Board to recall its decision and grant a rehearing. Under date of May 26, 1933, the Board denied the motion but ordered that the report and determination under date of April 24, 1933, be recalled and the proceeding referred to Division No. 4 for consideration and report and further that the decision based on said report entered under date of April 27, 1933, be and the same is hereby vacated, set aside and made for naught.

The Board under date of January 30, 1934, promulgated another opinion and on February 2, 1934, entered its decision and order of redetermination in accordance with its last opinion wherein and whereby it was ordered and decided that for the calendar year 1928 there is no deficiency in income tax due from the petitioner.

The nature of the controversy is as follows, to-wit:

The only question to be decided is whether the petitioner realized taxable income in declaring a dividend and paying it in stock of another company at an agreed value per share, which value was in excess of the cost of the stock to the respondent.

The respondent is a Delaware corporation engaged in the business of owning securities, managing and operating public utility properties. On January 1, 1927, the respond- [fol. 48] ent acquired 20,000 shares of no par common stock of the Islands Edison Company at a cost of, to-wit, $2,000.00, and set up such stock on its books at a total value of $2,000.00. During January of 1928 Walter Whetstone, president of the Southern Cities Utilities Company became interested in acquiring control of the Santo Domingo Company, the stock of which was owned by the Islands Edison Company. Whetstone was informed by Lucas, president of the respondent, that if a sale of the 20,000 shares of the common stock of the Islands Edison Company, then owned by the respondent, were consummated, such a sale would be made only after the respondent had distributed the Islands Edison Company shares to its stockholders because they had been advised by their attorneys that if sale were made by the respondent, it would be subject to a tax on any profit realized on the sale and that when the proceeds of the sale were distributed to the stockholders, the stockholders would have to pay another tax thereon.

At a meeting of the respondent's directors on March 22, 1928, the matter of the respondent's stockholdings of the Island Edison Company was discussed and it was reported as the opinion of the respondent's officers that the stock was worth at least $1,122,500.00, and that it should be appreciated on the respondent's books to that figure. During that meeting a resolution was adopted, the important part of which was as follows:

"That a dividend in the amount of $1,071,426.25 be and it is hereby declared on the common stock of this company, payable in common stock of the Islands Edison Company at a valuation of $56.12½ a share, * * * payment of the dividend to be made by the delivery to the stockholders of this company pro rata, of certificates for the common stock of the Islands Edison Company held by this company at the rate of two shares of such stock for each share of common stock of this corporation. * * *"

Thereupon, on March 22, 1928, in accordance with the resolution of the directors, the respondent distributed to its stockholders 19,090 shares of the stock of the Islands Edison Company, such stock representing two shares of the Islands Edison Company stock theretofore owned by the

respondent for each common share of the 9,545 shares of re-
[fol. 49] spondent's own capital stock then outstanding. On March 26, 1928, the stockholders of the Islands Edison Company entered into a written contract for the sale of the Islands Edison Company stock.

The fair market value of the Islands Edison Company stock as of March 22, 1928 was $56.12½ per share.

The respondent's earned surplus from operations as of December 31, 1927, was $1,360,515.96, which amount was not impaired by operating losses prior to March 22, 1928. Such surplus and all the capital of the respondent at December 31, 1927, were invested at cost in the assets of the company, of which assets only $41,152.00 was cash. On March 22, 1928, the total cash of respondent was not more than $49,004.23.

The respondent received no cash or other property from the distribution of said 19,090 shares of the Islands Edison Company stock. The respondent in making its income tax return for the calendar year 1928 reported no income from the disposition of the 19,090 shares of the Islands Edison Company stock. The petitioner upon auditing the return held that the respondent corporation derived profit of $1,069,517.25 from the disposition thereof. The Government contended before the Board that under the terms of the declaration of the dividend on March 22, 1928, the respondent became indebted to its stockholders in the amount of $1,071,426.25 and that the discharge of that liability by delivery of property costing less than the amount of the debt, the difference between indebtedness liquidated and the cost of the property so delivered, constituted income to the respondent.

A Division of the Board of Tax Appeals in holding that the amount by which the $56.12½ a share was in excess of the cost did not constitute taxable income to the respondent, said:

"The intent of the directors of the petitioner was to declare a dividend payable in Islands Edison stock; their intent was expressed in that way in the resolution formally adopted; and the dividend was paid in the way intended and declared. We so construe the transaction, and on au-
[fol. 50] thority of First Utah Savings Bank, supra, (17 B. T. A. 804, affirmed 53 F. (2d) 919), we hold that the declaration and payment of the dividend resulted in no taxable income."

The petitioner's assignments of error are as follows, to-wit:

1. The Board of Tax Appeals erred in failing to hold and decide that under the terms of the declaration of the dividend on March 22, 1928, the respondent became indebted to its stockholders in the amount of $1,071,426.25 and that the discharge of that liability by delivery of property costing less than the amount of the debt, the difference between the indebtedness liquidated and the cost of the property so delivered, constituted income to the respondent.

2. The Board of Tax Appeals erred in holding and deciding that said dividend declaration was equivalent to the declaration of a dividend in kind, there being no evidence to sustain such holding.

3. The Board of Tax Appeals erred in failing to hold and decide that the respondent realized a taxable profit of $1,069,517.25 from the disposition of the Islands Edison Company stock in accordance with the terms of the dividend resolution in question.

4. The Board of Tax Appeals erred in holding and deciding that there was no deficiency in income tax for the year 1928 due from this respondent.

5. The Board of Tax Appeals erred in failing to hold and decide that there was a deficiency in income tax for the year 1928 due from this respondent of $128,342.07.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Fourth Circuit, that a transcript of the record be prepared in accordance with the law and with the rules of said Court and transmitted to the Clerk of said Court for filing and that appropriate action be taken to the end that the errors complained [fol. 51] of may be reviewed and corrected by said Court.

(Sgd.) Frank J. Wideman, Assistant Attorney General. (Sgd.) Robert H. Jackson, General Counsel, Bureau of Internal Revenue. Of Counsel: Paul E. Waring, Special Attorney, Bureau of Internal Revenue.

Duly sworn to by Paul E. Waring. Jurat omitted in printing.

[fol. 52] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed April 27, 1934

To General Utilities and Operating Company, 1310 Standard Oil Building, Baltimore, Maryland:

You are hereby notified that the Commissioner of Internal Revenue did, on the 23rd day of April, 1934, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Fourth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 23rd day of April, 1934.

(Signed) Robert H. Jackson, General Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assign-
[fol. 53] ments of error mentioned therein, is hereby acknowledged this 24th day of April, 1934.

General Utilities & Op. Co., Respondent on Review.
J. C. M. Lucas, Prest.

Apr. 23, 1934.
PEW/HNP, 4-14-34.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed April 27, 1934

To Slaughter and Bickford, 815 15th Street, N. W., Washington, D. C.; Hugh C. Bickford:

You are hereby notified that the Commissioner of Internal Revenue did, on the 23rd day of April, 1934, file with

the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Fourth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the [fol. 54] assignments of error as filed is hereto attached and served upon you.

Dated this 23rd day of April, 1934.

(Sgd.) Robt. H. Jackson, General Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein is hereby acknowledged this 23rd day of April, 1934.

(Sgd.) Hugh C. Bickford, Attorney for Respondent on Review.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Title omitted]

PRÆCIPE FOR RECORD—Filed June 15, 1934

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Fourth Circuit, heretofore filed by the Commissioner of Internal Revenue:

[fol. 55] 1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board.

(a) Petition, including annexed copy of deficiency letter.

(b) Answer.

3. Stipulation of facts, together with all exhibits attached thereto. (A to E sent up in original form.)

4. Findings of fact, opinion and decision of the Board promulgated April 24, 1933.

5. Motion for rehearing filed May 17, 1933.

6. Order entered May 26, 1933, vacating and setting aside decision of the Board dated April 27, 1933.

7. Findings of fact, opinion and decision of the Board promulgated January 30, 1934.

8. Petition for review, together with proof of service of notice of filing petition for review and service of a copy of petition for review.

9. This præcipe.

(Signed) Robert H. Jackson, General Counsel, Bureau of Internal Revenue.

Service of a copy of the within præcipe is hereby admitted this 3 day of May, 1934.

(Sgd.) R. Kemp Slaughter, Attorney for Respondent.

PEW/HNP, 5-2-34.

[fol. 56] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 57 & 58] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Title omitted]

ORDER AS TO ORIGINAL EXHIBITS

Upon consideration of the joint motion filed by the parties herein on the 16th day of July, 1934, it is this 17th day of July, 1934,

Ordered that the documents, consisting of Exhibits A, B, C, D and E of the written stipulation of facts filed with the United States Board of Tax Appeals at the hearing of this proceeding, may be transmitted to this Court as original documents comprising a part of the record and that the Clerk of this Court retain custody thereof for the use of the Court and counsel at the hearing of this proceeding.

John J. Parker, Senior Circuit Judge.

[fol. 59] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 3720

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner,

versus

GENERAL UTILITIES AND OPERATING COMPANY, Respondent

On Petition to Review the Decision of the United States Board of Tax Appeals

DOCKET ENTRIES

July 21, 1934, the transcript of record is filed and the cause docketed.

Same day, certified copy of order enlarging time to July 31, 1934, for the transmission and delivery of the transcript of record is filed.

Same day, the appearance of Frank J. Wideman, Assistant Attorney General, and Sewall Key, Special Assistant, Attorney General, is entered for the petitioner.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION AS TO ORIGINAL EXHIBITS A, B, C, D AND E—Filed July 16, 1934

Come now Guy T. Helvering, Commissioner of Internal Revenue, and the General Utilities and Operating Company, by their respective counsel, and respectfully show [fol. 60] that on April 23, 1934, the petitioner, the aforesaid Commissioner of Internal Revenue, filed with the Clerk of the U. S. Board of Tax Appeals his petition for review of decision entered by the Board of Tax Appeals on February 2, 1934. Præcipe was filed on June 15, 1934, for the preparation of the record. In the trial before the Board the entire evidence was submitted by written stipulation of facts to which was attached a number of exhibits including A, B, C, D and E. Said exhibits, A, B, C and D, consist of photo-

static copies of a large number of stock certificates which it is impossible to reproduce in the printed record, while exhibit E is a photostatic copy of an original contract involved in this proceeding. Said exhibits could only be reproduced in photostatic form at great expense.

Wherefore the parties respectfully move that permission be granted to send said original photostats, comprising said exhibits, to this Court as a part of the record and that the Court enter its order accordingly.

Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue. Hugh C. Bickford, Attorney for Respondent.

ORDER AS TO ORIGINAL EXHIBITS

Filed July 17, 1934

(Note: This order is printed at page 57 and is, therefore, omitted here.)

IN UNITED STATES CIRCUIT COURT OF APPEALS

DOCKET ENTRIES

July 21, 1934, original exhibits A, B, C, D and E are certified up.

July 25, 1934, the appearance of R. Kemp Slaughter and Hugh C. Bickford is entered for the respondent.

July 27, 1934, the appearance of Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Reve- [fol. 61] nue, and William E. Davis, Special Attorney for the Bureau of Internal Revenue, is entered for the petitioner.

August 22, 1934, twenty-five copies of the printed record are filed.

October 19, 1934, the appearance of Norman D. Keller, Special Assistant to the Attorney General, is entered for the petitioner.

Argument of Cause

November 22, 1934, (October term, 1934,) cause came on to be heard before Parker, Northcott and Soper, Circuit Judges and is argued by counsel and submitted.

December 11, 1934, motion of respondent for leave to file supplemental brief is filed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER ALLOWING FILING OF SUPPLEMENTAL BRIEF—Filed December 11, 1934

Upon motion filed by the respondent herein, and for good cause shown,

It is ordered that permission is granted respondent to file the supplemental brief on behalf of respondent submitted with respondent's motion.

It is further ordered that the petitioner be granted 10 days within which to file reply to the same.

John J. Parker, Senior Circuit Judge.

[fol. 62] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3720

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner,

versus

GENERAL UTILITIES AND OPERATING COMPANY, Respondent

On Petition to Review the Decision of the United States Board of Tax Appeals

(Argued November 22, 1934. Decided January 8, 1935)

Before Parker, Northcott, and Soper, Circuit Judges

Norman D. Keller, Special Assistant to the Attorney General, (Frank J. Wideman, Assistant Attorney General, and Sewall Key, Special Assistant to the Attorney General, on brief) for Petitioner, and Hugh C. Bickford (R. Kemp Slaughter and Joseph A. Slattery, on brief) for Respondent.

OPINION—Filed January 8, 1935

NORTHCOTT, Circuit Judge:

This is a petition to review a decision of the United States Board of Tax Appeals involving income tax of the

[fol. 63] respondent for the calendar year 1928 in the sum of $128,342.07. The opinion of the Board of Tax Appeals will be found in 29 B. T. A. 934.

The facts were stipulated and the Board set aside a finding of deficiency made by the Commissioner of Internal Revenue in the above named amount and the Commissioner filed this petition to review the action of the Board.

The respondent is a Delaware corporation, with its principal offices at Baltimore, Maryland. It is engaged in the business of owning securities of, managing, and operating public utility properties.

On January 1, 1927, the respondent acquired 20,000 shares of no par value of the common capital stock of another corporation, the Islands Edison Company. Said 20,000 shares of stock constituted one-half of the total common capital stock of said Islands Edison Company outstanding; the remaining 20,000 shares were owned by Gillet & Company, which company is not connected with respondent nor with respondent's stockholders. Respondent acquired said 20,000 shares of common capital stock of the Islands Edison Company at a cost to it of $2,000.00 and set up such stock on its books at a total value of $2,000.

During the month of January, 1928, Walter Whetstone, president of the Southern Cities Utilities Company, became interested in acquiring control of a Santo Domingo company, the stock of which was owned by the Islands Edison Company. Upon inquiring of Gillet & Company Whetstone ascertained that the entire common stock outstanding of the Islands Edison Company was owned equally by Gillet & Company and respondent. In a conference with J. C. M. Lucas, president of respondent, Whetstone discussed the purchase of the Santo Domingo Company or the Islands Edison Company common stock and as a result thereof was given permission to make an investigation of the properties of the Santo Domingo Company. Sometime in February, 1928, Whetstone informed Gillet and Lucas that his plans required the delivery of all the common stock of the Islands Edison Company, and he was informed by Gillet that his firm was ready and willing to make the sale of the 20,000 shares, owned by Gillet & Company, of the Islands Edison Company common stock and that he (Gillet) and Lucas, [fol. 64] president of respondent, had agreed upon the price at which the sale would be made. Whetstone was informed

by Lucas that if a sale of the 20,000 shares of the common stock of the Islands Edison Company then owned by the respondent were consummated such a sale would be made only after respondent had distributed the Islands Edison Company shares to its stockholders, because they had been advised by their attorneys that if sale were made by respondent it would be subject to a tax on any profit realized on the sale and that when the proceeds of the sale were distributed to the stockholders, the stockholders would have to pay another tax thereon. The price to be paid for the properties and generally the terms and conditions of the sale were agreed upon by Gillet, Lucas, and Whetstone, but no contract was entered into by them, it being understood and agreed between them that respondent would make distribution of the stock of the Islands Edison Company to its stockholders and that counsel would prepare a written agreement embodying the terms and conditions of the said sale, said agreement to be submitted for approval to the stockholders of the Islands Edison Company after the distribution of said stock by the respondent. Lucas never held power of attorney to sell said stock for the respondent or its stockholders.

At a meeting of respondent's directors on March 22, 1928, the matter of respondent's stockholdings in the Islands Edison Company was discussed and it was reported as the opinion of respondent's officers that the stock was worth at least $1,120,500.00 and that it should be appreciated on respondent's books to that figure. Further matters discussed and action taken at that meeting are recorded in the minutes as follows:

"The chairman also suggested to the meeting that the Company considered declaring a dividend on the Common Stock of the Company in the amount of $1,071,426.25, payable out of the appreciation so set up, the dividends to be paid in Common Stock of the Islands Edison Company at a value of $56.12½ a share.

Whereupon the following resolutions were unanimously passed, viz:

[fol. 65] (a) that this Company appreciate on its books, its holdings of Common Stock of the Islands Edison Company in the amount of 20,000 shares in the amount of $1,-

120,500.00 and that the amount of this appreciation be credited to surplus arising from appreciation of assets;

(b) that a dividend in the amount of $1,071,426.25 be and is hereby declared on the Common Stock of this Company payable in Common Stock of the Islands Edison Company at a valuation of $56.12½ a share, out of the surplus of the Company arising from the appreciation in the value of the Common Stock of the Islands Edison Company held by this Company, viz, $1,120,500.00, the payment of this dividend to be made by the delivery to the stockholders of this Company pro rata, of certificates for the Common Stock of the Islands Edison Company held by this Company at the rate of two shares of such stock for each share of Company Stock of this Corporation; the stockholders entitled to be those of record at the close of business this day.

There being no further business before the meeting it then adjourned."

The respondent thereupon, on March 22, 1928, simultaneously entered on its books of account, in compliance with the foregoing resolution, the following entries, with full explanation following each entry, only part of which is here set forth:

1928		Dr.	Cr.
March 22.	Investments	$1,120,500.00	
	Surplus arising from appreciation of assets		$1,120,500.00
March 22.	Surplus arising from appreciation of assets	1,071,426.25	
	Dividends payable		1,071,426.25
	To record dividend declared on the Common Stock of the Company, payable in Common Stock of The Islands Edison Company at a valuation of $56.12½ a share, * * *		
March 22.	Dividends payable	1,071,426.25	
	Investments		1,071,426.25
[fol. 66]	To record payment of dividends declared March 22, 1928, on the Common Stock of this Company, such payment being made by delivery of 19,090 shares of the Common Stock of The Islands Edison Company at a valuation of $56.12½ per share.		

Thereupon, on March 22, 1928, in accordance with the resolution of the directors the respondent distributed to its own stockholders, 19,090 shares of the stock of the

Islands Edison Company, such shares representing two shares of the Islands Edison Company stock theretofore owned by respondent for each one share of the 9,545 shares of respondent's own capital stock then outstanding. On the same date, March 22, 1928, the shares of stock were transferred on the stock records of the Islands Edison Company to the individuals receiving the distribution. After transfer of the 19,090 shares, there remained in the hands of respondent 910 shares of stock of the Islands Edison Company, which 910 shares were retained by it and a new certifi- [fol. 67] cate for such shares was issued to it on March 22, 1928.

On March 26, 1928, the stockholders of the Islands Edison Company (one of which was the respondent, owning 910 shares) and the Southern Cities Utilities Company, entered into a written contract of sale of the Islands Edison Company stock. At no time did respondent agree with Whetstone or the Southern Cities Utilities Company, verbally or in writing, to make sale to him or to the Southern Cities Utilities Company of any of said stock except the aforesaid 910 shares of the Islands Edison Company.

The fair market value of the Islands Edison Company stock as of March 22, 1928, was $56.12½ per share, said amount being computed in the contract dated March 26, 1928, as follows:

"Total sales price	$3,375,000
Less: Liability for bonds and preferred stock outstanding	1,130,000
Net consideration for stock	$2,245,000"

The net consideration, $2,245,000, divided by the number of shares, 40,000, gives a quotient of $56.12½ per share.

Respondent's earned surplus from operations as of December 31, 1927, was $1,360,515.96, which amount was not impaired by operating losses prior to March 22, 1928. Such surplus and all the capital of the respondent at December 31, 1927, were invested at cost in assets of the company, of which assets only $41,152.00 was cash. On March 22, 1928, the total cash of respondent was not more than $49,004.23.

The 910 shares of the Islands Edison Company common stock which were retained by the respondent after the distribution of 19,090 shares to its stockholders on March 22, 1928, were sold to the Southern Cities Utilities Company on

May 14, 1928, and a profit of $46,346.30 was reported on the 1928 return filed by the respondent, computed as follows:

[fol. 68] "Sale price of 910 shares at $51.25 per share $46,437.30
Cost of 910 shares at 10¢ per share 91.00

Profit reported in return ..... $46,346.30"

The difference between the amount of $56.12½ per share, set forth above as the price stated in the contract of March 26, 1928, and the amount of $51.25 as shown in this paragraph as the amount received on May 14, 1928, when sale was made, is represented by brokerage charges, commissions and other expenses incident to the consummation of the sale which were charged against the stockholders in accordance with the provisions of the contract.

The respondent received no cash or other property for the distribution of said 19,090 shares of the Islands Edison Company common stock.

Respondent, in making its income tax return for the calendar year 1928, reported no income from the disposition of the 19,090 shares of the Islands Edison common stock. The petitioner upon auditing the return, has held that the respondent corporation derived a profit of $1,069,517.25 from the disposition thereof, the explanation in the notice of deficiency being in part as follows:

"It is therefore held that your corporation realized a taxable gain of $1,069,517.25 upon the distribution of The Islands Edison Company stock in payment of the dividend of $1,071,426.25, as follows:

"Distribution of 19,090 shares of stock at market value of $56.125 a share in satisfaction of dividend obligation $1,071,426.25
Cost of stock distributed, $0.10 a share 1,909.00

Profit realized $1,069,517.25

There are two grounds upon which the petitioner urges that the action of the Board of Tax Appeals was wrong: First, that the dividend declared was in effect a cash divi- [fol. 69] dend and that the respondent realized a taxable income by the distribution of the Islands Edison Company stock to its stockholders equal to the difference between the

amount of the dividend declared and the cost of the stock; second, that the sale made of the Islands Edison Company stock was in reality a sale by the respondent (with all the terms agreed upon before the declaration of the dividend), through its stockholders who were virtually acting as agents of the respondent, the real vendor.

As to the first contention we are of the opinion that the action of the Board of Tax Appeals was correct. The resolutions of the board of directors of the respondent declaring the dividend, is capable of only one interpretation, that the dividend was payable not in cash but in the common stock of the Islands Edison Company. Under this resolution the stockholders could not, in the event of the failure to deliver the stock of the Islands Edison Company, have had the right to recover an equal amount of cash. In the case of The State of Maryland v. Balt. & Ohio R. R. Company, 6 Gill 363, a discussion will be found as to a dividend declared under a resolution analogous to the one here in question and in that case a conclusion was reached similar to that reached by us here.

As to the second point raised by the petitioner, it is contended on behalf of the respondent that this point, not having been raised before the Board, cannot now be urged before us for the first time. We cannot agree with this conclusion. The correctness of the result reached by the Commissioner of Internal Revenue in determining the deficiency is the controlling factor and not the method by which it was determined nor the reasons given for the determination.

Hughes v. Commissioner, 38 Fed. (2) 755.
Hurwitz v. Commissioner, 45 Fed. (2) 780.
Helvering v. Gregory, 69 Fed. (2) 809.

Where all of the facts are before the Board of Tax Appeals it may pass upon the correctness of the Commissioner's final determination (Christopher v. Burnet, 55 Fed. (2) 527). Here the facts are undisputed and the questions [fol. 70] presented are purely questions of law upon the admitted facts. We are also of the opinion that the issue first raised on appeal before us can be considered if "justice so requires". As was said by Judge Parker of this court in Virginia Lincoln Furniture Corporation v. Commissioner, 56 Fed. (2) 1028:

"In addition to this, it appears from the record that petitioner is entitled to relief; and we will not turn him out of

court because he may have misconceived his remedy. As we have said before, courts exist to do justice, not to furnish a forum for the technical skill of counsel. In reviewing a decision of the Board, we are given broad powers to affirm, modify, or reverse it 'as justice may require' (26 U. S. C. A., Sec. 1226); and we do not think that justice requires that a petitioner with a meritorious case be turned out of court upon any such technical ground. See Underwood v. Commissioner (C. C. A. 4th) 56 F. (2d) 67.

See, also:

Hurwitz v. Commissioner, supra.
Superheater Co. v. Commissioner, 38 F. (2) 69.
Seufert Bros. Co. v. Lucas, 44 F. (2) 528.
Commissioner v. Norfolk Southern R. Co., 63 F. (2) 304.

The reason for the rule, sometimes enforced by the courts, that an appellate court will confine itself to the issue presented and ruled upon by the court below, is based on the ground that the opposing party has no opportunity to resist the new issue by amendment of the pleadings or by additional proof. No such conditions exist here. No amendment to the pleadings is required to settle the issue here discussed and no additional evidence could change the stipulated fact. Under the broad powers given us to review decisions of the Board we have the power to pass on the question raised if the requirements of justice demand it. No good purpose could possibly be served by remanding the case to the Board for a further decision on a point that can be decided here on the stipulated facts.

The respondent was not taken by surprise by the raising [fol. 71] of this question. It was discussed in the brief, on behalf of petitioner, filed October 19, 1934, and replied to in detail in the brief on behalf of respondent, filed November 10, 1934, prior to the oral argument before us.

When we come to consider the sale of the stock of the Island Edison Company we cannot escape the conclusion that the transaction was deliberately planned and carried out for the sole purpose of escaping taxation. The purchaser was found by the officers of the respondent; the exact terms of the sale as finally consummated were agreed to by the same officers; the purchaser of the stock stated that the delivery of all the stock was essential and that the delivery of a part thereof would not suffice; the details

were worked out for the express and admitted purpose of avoiding the payment of the tax and for the reason that the attorneys for the respondent had advised that unless some such plan was adopted the tax would have to be paid; and a written agreement was to be prepared by counsel for the respondent which was to be submitted to the stockholders; all this without the stockholders, or any of them, who were ostensibly making the sale, being informed, advised or consulted. Such admitted facts plainly constituted a plan, not to use the harsher terms of scheme, artifice or conspiracy, to evade the payment of the tax. For the purposes of this decision it is not necessary to consider whether such a course as is here shown constituted a fraud, it is sufficient if we conclude that the object was to evade the payment of a tax justly due the government.

The sale of the stock in question was, in substance, made by the respondent company, through the stockholders as agents or conduits through whom the transfer of the title was effected. The stockholders, even in their character as agents, had little or no option in the matter and in no sense exercised any independent judgment. They automatically ratified the agreement prepared and submitted to them.

Where a plan of action is proven the courts will consider it as a whole rather than divide it into independent steps "Two steps in a single transaction" cannot be treated as two transactions. (Prairie Oil & Gas Co. v. Motter, 66 Fed. (2) 309; West Texas Refining & D. Co. v. Commissioner, 68 Fed. (2) 77.)

In matters of taxation the substance rather than the [fol. 72] form of the transaction will be regarded. (U. S. v. Phellis, 257 U. S. 156, and authorities there cited.)

In substance the transaction here involved was a sale of the stock of the Islands Edison Company by the respondent. Anticipatory arrangements, intended to circumvent the taxing statutes, are not looked upon with favor by the courts. As was said in MacQueen Co. v. Commissioner, 67 Fed. (2) 857:

"The principle that substance and not form should control in the application of income tax laws (United States v. Phellis, 257 U. S. 156; Labrot v. Burnet, 57 Fed. (2) 413; Reed v. United States, 51 F. (2d) 941) may be invoked in the instant case. Although in form there were two sales

of the corporate real estate, first, the purported sale by the petitioner to MacQueen, and, second, the sale by MacQueen to Hatfield, in substance the transaction was a sale by the petitioner to Hatfield through the agency of MacQueen. So also, although in form MacQueen was a trustee for the distribution of the profits earned by the sale of his own real estate to Hatfield, in substance he was the agent of the petitioner for the distribution of the profits from the sale of the corporation's real estate among its stockholders.

The corporate tax rate imposed by the applicable taxing statutes is higher than the individual rate. The obvious purpose of the procedure followed by the petitioner, its directors, and stockholders, was to take advantage of the lower tax rate permitted individuals and thereby avoid the corporate tax rate on the profits of the ultimate sale of the real estate. Such anticipatory arrangements and contracts, intended to circumvent the taxing statutes, are not looked upon with favor. Lucas v. Earl, 281 U. S. 111; Phelps v. Commissioner, 54 F. (2d) 289, certiorari denied, 285 U. S. 558."

The decision of the Board of Tax Appeals is reversed and the cause is remanded for further proceedings in accordance with this opinion.

Reversed.

[fols. 73 & 74] IN UNITED STATES CIRC[illegible] COURT OF APPEALS,
FOURTH CIRCUIT

No. 3720

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

vs.

GENERAL UTILITIES AND OPERATING COMPANY, Respondent

On Petition to Review the Decision of the United States Board of Tax Appeals

JUDGMENT—Filed and Entered January 9, 1935

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this Court that the decision of the said Board of Tax Appeals, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States Board of Tax Appeals for further proceedings in accordance with the opinion of the Court filed herein.

Elliott Northcott, U. S. Circuit Judge.

January 9, 1935.

[fols. 75-132] Petition for rehearing, covering 57 pages, filed Feb. 6, 1935, omitted from this print. It was denied and nothing more by order of April 2, 1935.

[fol. 133] February 6, 1935, application of respondent for a stay of the mandate is filed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE PENDING PETITION FOR A REHEARING—Filed February 6, 1935.

Upon consideration of the application of respondent for a stay of mandate and it appearing that the respondent has this day presented a petition for a rehearing in the above entitled case,

It is ordered that the mandate of this Court in this case be, and the same is hereby, stayed pending the action of the Court on said petition for rehearing.

John J. Parker, Senior Circuit Judge.

February 6, 1935.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

[Title omitted]

ORDER DENYING REHEARING—Filed and Entered April 2, 1935

[fol. 134] This Court having at its January term, 1935, rendered its decision reversing the decision of the said

United States Board of Tax Appeals in this cause, and the respondent having on February 6, 1935, presented to the Court a petition for a rehearing of the said cause, and the same having been carefully considered,

It is now here ordered by this Court that the rehearing asked for, be, and the same is hereby, denied. Let mandate issue after the expiration of five days from this date.

John J. Parker, Senior Circuit Judge.

April 2, 1935.

April 4, 1935, application of respondent for a stay of the mandate is filed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE PENDING APPLICATION OF RESPONDENT FOR A WRIT OF CERTIORARI—Filed April 4, 1935

Upon consideration of the application of respondent for a stay of mandate and it appearing that the respondent desires to file with the Supreme Court of the United States petition for writ of certiorari in the above entitled case,

It is ordered that the mandate of this Court in this case be, and the same is hereby, stayed pending the action of the Supreme Court of the United States on petition for writ of certiorari, provided application for certiorari is made within thirty days of this date.

John J. Parker, Senior Circuit Judge.

April 4, 1935.

[fol. 135] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 136] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 3, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly

certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,567. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 41. General Utilities and Operating Company, Petitioner, vs. Guy T. Helvering, Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed May 3, 1935. File No. 41, O. T., 1935.

(6507-C)